National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: July 1, 1996

TO: Gerard P. Fleischut, Regional Director, Region 26

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Blackjack Service Co., Inc. and, J. Graves Insulation Co., Inc., Case 26-CA-17326

524-0183-3333, 524-0183-3367

This Section 8(a)(3) and (1) case was submitted for advice on whether prima facie evidence of discrimination against the hiring of Union employees has been rebutted by the Employer's business justification of greater efficiency.

The Employer Graves performs asbestos abatement and was signatory to a Section 8(f) agreement which expired on April 30, 1996. The agreement did not require Graves to use the Union's referral service for employees for new jobs, and also did not require it to pay the wages and benefits specified in the agreements to non-referred employees, i.e., to employees whom Graves hired directly. However, when Graves did employ Union referred employees, it was required to pay contract wages and benefits including health and welfare and pension fund contributions.

Beginning in 1995, Graves began hiring Mexican workers for some of its projects. Graves' practice was to use crews composed entirely of either Union referred employees or non-referred Mexican workers. During late 1995, Graves began hiring more Mexican employee crews and fewer Union referred employee crews. For example, in October 1995, Graves had 8 Hispanic surname employees and 15 Anglo surname employees, but by April 1996, Graves had 17 Hispanic surname employees and only 3 Anglo surname employees.[(1)] By the expiration date of the contract, Graves was employing only a few Union referred employees intermittently, and was occasionally employing them as supervisors of Mexican crews.

It is undisputed that Graves paid all Mexican crew members the top wages listed under the 8(f) agreement but did not also make contractual contributions to the health and welfare and pension funds. Graves instead made noncontractual per diem payments to the Mexican crews.[(2)]

In around September 1995, a Graves manager stated that "the company was going to get rid of the Union when the contract was up." In fact Graves did repudiate its Section 8(f) relationship with the Union at contract expiration. We conclude, in agreement with the Region, that this statement along with Graves' statistically shown decreased employment of Union referred employees is prima facie evidence that Graves was discriminatorily refusing to employ Union referred employees.

Graves asserted several defenses which the Region found to be without merit.[(3)] Graves credibly asserted, however, that it had another valid business justification for its increased use of Mexican workers, viz., higher productivity. Graves produced a January 1996 memorandum concerning a project in Little Rock, AR. According to this memorandum, a crew of Union referred employees removed 4,400 square feet of asbestos in the same time period that a Mexican employee crew removed 11,100 square feet of asbestos. The Region has also found that two of Graves' customers raised the issue of the poorer work performance of the Anglo workers in comparison with that of the Mexican workers.

We conclude, in agreement with the Region, that further proceedings are not warranted because Graves has rebutted the prima facie statistical evidence of apparent discrimination with sufficient nondiscriminatory business justification.

In Wright Line,[(4)]

the Board held that in cases alleging violations of Section 8(a)(3) which turn on employer motivation, the General Counsel

must first make out a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in an employer's decision to take adverse action against an employee. The burden then shifts to the employer "to demonstrate that the same action would have taken place even in the absence of protected conduct." (5)

The prima facie violation here rests on the statistical decreased use of Union referred crews occurring after a threat to repudiate the Section 8(f) relationship. We conclude that Graves has shown that it would have employed fewer Union referred employees without regard to their Union membership status and the pending expiration of the Section 8(f) contract.

First, the applicable Section 8(f) contract contained no exclusive referral system and freely allowed Graves to use non-referred Mexican crews. Since Graves could and did employ Mexican crews under the contract, Graves can persuasively argue that it had no need to repudiate either the Union relationship or the 8(f) contract in order to hire Mexican crews. Second, Graves has adduced evidence that the Mexican crews were significantly more efficient than the Union referred crews. This evidence further supports Graves' contention that it would have employed fewer Anglo employees over time without regard to their Union membership status. Lastly, Graves paid its Mexican crews both the highest contractual wage rate together with a non-contractual per diem amount. The Region found as a result that Graves realized no direct expense advantage in employing the Mexican crews over the Union referred employees. This factor further supports Graves' contention that it would have acted the same without regard to the referred employees' Union membership.

In sum, since Graves could have hired the Mexican crews even as a contract signatory, and since these crews were more efficient and no more costly than the Union referred employee crews, the Employer has met its Wright Line burden of establishing that "the same action would have taken place even in the absence of protected conduct." (6)

B.J.K.

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[1] The Region has found that the Anglo surname employees were Union referred employees and not Mexican workers.

[2] As a result, the Region found that there likely was no clear employee cost advantage for Graves to employ Mexican crews over Union referred crews.

[3] For example, the Region rejected Graves' contention that several Union referred employees voluntarily quit, asked to be laid off, or stopped calling for referrals. The Region also rejected any contention that, towards the end of this period, the remaining Union referred employees were Section 2(11) supervisors.

[4] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[5] Id. at 1089.

[6] Id. at 1089.